

Liability of the State and its Employees for the Negligent Investigation of Child Abuse Reports

This note argues that the State of Alaska and its social workers owe a duty of care to protect children identified to them as victims of abuse. If a plaintiff can prove a breach of this duty and an injury proximately caused by that breach, under the Alaska governmental immunity statute the State should be held liable for the negligent investigation of a child abuse report. Individual social workers, however, are protected by qualified immunity under the common law doctrine of official immunity. Imposing liability on the State, and not on individual social workers, is also the best solution from a policy standpoint, as it deters negligence, compensates victims, and limits the problems of overintervention and interference with the effective functioning of government.

I. INTRODUCTION

Like many other states, Alaska has a child protection program designed to prevent child abuse. The program is governed by Title 47 of the Alaska Code¹ and is administered by the Department of Health and Social Services ("DHSS"). However, as investigations by social service agencies are sometimes insufficient or negligent, reporting a suspected case of child abuse to an agency such as DHSS does not always ensure protection from further abuse. Studies in several states show that approximately twenty-five percent of all child fatalities resulting from abuse or neglect occur *after* the abuse has been reported to a child protective agency.² "Tens of

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1. ALASKA STAT. §§ 47.10.080-.490, 47.17.010-.290 (1990 & Supp. 1992).

2. Douglas J. Besharov, *Protecting Children from Abuse: Should It Be a Legal Duty?*, 11 U. DAYTON L. REV. 509, 510 (1986) (citing REGION VI RESOURCE CENTER ON CHILD ABUSE AND NEGLECT, CHILD DEATHS IN TEXAS 26 (1981)).

thousands of other children" have been seriously injured while under the protection of a social service agency.³

Due to a rising awareness of this problem, the imposition of liability on the State and/or individual social workers for the negligent handling of child abuse reports has been an increasingly litigated issue in recent years. The United States Supreme Court addressed this issue in *DeShaney v. Winnebago County Department of Social Services*.⁴ In *DeShaney*, the Court held that a State's failure to remove a child from his home after receiving reports of severe abuse did not violate the child's due process rights under the Fourteenth Amendment.⁵ However, the Court left open the possibility that the State might be liable under its own tort law in this situation, stating that "[i]t may well be that, by voluntarily undertaking to protect [the child] against a danger it concededly played no part in creating, the State acquired a duty under state tort law to provide him with adequate protection against that danger."⁶ In response to *DeShaney*, many state courts have recently considered the possibility of imposing tort liability for the negligent handling of child abuse reports. In Alaska, at least one suit against the State for the negligent investigation of a child abuse report is currently pending.⁷

This note considers whether Alaska courts should impose tort liability on the State of Alaska and/or state social workers for the negligent investigation of child abuse reports. Part II argues that the State and its employees assume a duty of care toward children

3. *Id.*; see also Douglas J. Besharov, "Doing Something" About Child Abuse: The Need to Narrow the Grounds for State Intervention, 8 HARV. J.L. & PUB. POL'Y 539, 551 (1985).

4. 489 U.S. 189 (1989).

5. *Id.* at 196-97. Although the Supreme Court foreclosed the possibility of liability under the United States Constitution, it is still possible that liability could arise under the Alaska Constitution's Due Process Clause. This note, however, is concerned with the more widely explored issue of tort liability and does not address the separate issue of liability under the Alaska Constitution.

6. *Id.* at 201-02 (citing RESTATEMENT (SECOND) OF TORTS § 323 (1965); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 56 (5th ed. 1984)).

7. Estate of Todd Burnette v. State, No. 3AN-91-3595 CI (Superior Court of Alaska, Third Judicial District, 1992 Term). In *Burnette*, the investigating social workers were originally named as defendants but have since been dismissed from the action. In return, the State has dropped its official immunity argument. See Stipulation and Order, Estate of Todd Burnette v. State, No. 3AN-91-3595 CI (Superior Court of Alaska, Third Judicial District, Jan. 21, 1993).

reported to them as the victims of child abuse and that the remaining elements of negligence should be determined on a case-by-case basis. Part III addresses the issue of governmental immunity and concludes that under Alaska law, while individual social workers are protected from liability by the doctrine of qualified immunity, the State may be held liable for negligence. Part IV examines the policy arguments favoring and opposing the imposition of liability on the State and/or individual social workers and argues that imposing liability solely on the State advances sound public policy. Finally, part V concludes that the State of Alaska must be held liable for the negligent investigation of child abuse reports by its employees. Investigating social workers, however, should be immune from liability so long as they have conducted their investigations in good faith.

II. NEGLIGENCE

To impose liability for the negligent handling of child abuse reports, the three elements of negligence must be shown: duty, breach of duty and an injury proximately caused by the breach.⁸ As in most states that have addressed the issue, Alaska, under Title 47 of the Alaska Code, has established a series of procedures and standards that govern state employees responding to reports of child abuse.⁹ The State thus owes a duty to abused children because, in enacting its child protection statutes, it established a special relationship between the State and children who are reported as abused. Moreover, the State has an additional common law duty to abused children because it voluntarily chose to protect such children. The remaining elements of a negligence suit, breach of duty and an injury proximately caused by that breach, should be determined on the facts of each case and should be found only where there are clear warning signs that a child should have been taken into protective custody.

8. *C.f.* *Otness v. United States*, 178 F. Supp. 647, 650 (D. Alaska 1959) (stating the basic elements of a negligence claim).

9. *See* ALASKA STAT. §§ 47.10.142 (emergency custody and temporary placement hearing), 47.10.230-.260 (care and placement of child), 47.17.010-.290 (reporting requirements) (1990 & Supp. 1992); *see infra* notes 10-16 and accompanying text.

A. Duty

1. *Standards Created by the Alaska Code.* Alaska's child abuse statutes are similar to those of other states; the statutory scheme provides a set of procedures designed to protect abused children. Alaska Statutes section 47.17.010 sets forth the statutory purpose, which emphasizes the protection of children identified to the State as victims of abuse:

It is the intent of the legislature that, as a result of these reports [of suspected abuse], protective services will be made available in an effort to

- (1) prevent further harm to the child;
- (2) safeguard and enhance the general well-being of children in this state; and
- (3) preserve family life unless that effort is likely to result in physical or emotional damage to the child.¹⁰

When DHSS receives a report of child abuse, it must notify the Department of Law, investigate the report and issue written findings to the Department of Law within seventy-two hours of receiving the report.¹¹ Alaska Statutes section 47.17.020(e)(3) also requires that DHSS immediately notify the nearest law enforcement agency upon concluding that the situation involves either the possibility of criminal conduct or "abuse or neglect that results in the need for medical treatment of the child."¹²

The statutes provide DHSS with an array of powers to protect abused children. DHSS may refer the matter to an appropriate local agency; if it does not, it must "for each report received, investigate and take action, in accordance with the law, that may be necessary to prevent further harm to the child or to ensure the proper care and protection of the child."¹³ Before DHSS or a local agency may seek the termination of parental rights, it must "offer protective social services and pursue all other reasonable means of protecting the child."¹⁴ Furthermore, DHSS may take a minor child into emergency custody if the individual has been abandoned, grossly neglected by his parents or guardian, or sexually abused.¹⁵

10. ALASKA STAT. § 47.17.010 (1990).

11. *Id.* § 47.17.025(a).

12. *Id.* § 47.17.020(e)(3).

13. *Id.* § 47.17.030(a). If DHSS refers the matter to a local agency, that agency has the same duty as DHSS would have had, and the agency must submit a report to DHSS. *Id.* § 47.17.030(b).

14. *Id.* § 47.17.030(d).

15. *Id.* § 47.10.142(a).

The State may also take a minor into custody if the child has been abused or neglected by someone responsible for his welfare and DHSS "determines that immediate removal from the minor's surroundings is necessary to protect the minor's life or that immediate medical attention is necessary."¹⁶

In these regards, Alaska's child protection statutes resemble those enacted in other states. The laws in most states contain a purpose clause revealing a legislative intent to protect abused children.¹⁷ Most statutes similarly set out specific procedures for an agency to follow when it receives a report of child abuse. Upon receiving reports of suspected abuse, most state agencies must investigate them in accordance with provisions of state law and administrative regulations.¹⁸

2. *Recognizing a Statutory Duty of Care Toward Abused Children.* In considering social worker and/or state liability for negligent investigations, most state courts have held that state child abuse statutes create a special relationship between the State and a child who is the subject of a child abuse report.¹⁹ This special relationship gives rise to a duty of protection owed by the State to the abused child. For example, in *Brodie v. Summit County Children Services Board*,²⁰ the Ohio Supreme Court held that when the state agency received a report that a child had been a victim of abuse, the state child abuse statutes imposed a duty on the agency "to take affirmative action on behalf" of that child.²¹ Courts in Arizona,²² the District of Columbia,²³ Florida,²⁴ North Caroli-

16. *Id.*

17. Laura H. Martin, Comment, *Caseworker Liability for the Negligent Handling of Child Abuse Reports*, 60 U. CIN. L. REV. 191, 194 (1991) (citing FLA. STAT. ANN. § 415.501(1) (West 1986)).

18. *Id.* at 195; see also Besharov, *supra* note 2, at 525, 529.

19. See, e.g., *Mammo v. State*, 675 P.2d 1347 (Ariz. Ct. App. 1983); *Turner v. District of Columbia*, 532 A.2d 662 (D.C. 1987); *Department of Health & Rehabilitative Servs. v. Yamuni*, 529 So. 2d 258 (Fla. 1988); *Coleman v. Cooper*, 366 S.E.2d 2 (N.C. Ct. App. 1988); *Brodie v. Summit County Children Servs. Bd.*, 554 N.E.2d 1301 (Ohio 1990); *Reed v. Perry County Children's Servs.*, 1993 Ohio App. LEXIS 3408 (Ohio App. June 29, 1993); *Jensen v. Anderson County Dep't of Social Servs.*, 403 S.E.2d 615 (S.C. 1991); *Owens v. Garfield*, 784 P.2d 1187 (Utah 1989).

20. 554 N.E.2d 1301 (Ohio 1990).

21. *Id.* at 1308.

22. *Mammo*, 675 P.2d at 1351 (noting that the "statute in question is quite specific and sets forth duties on the part of protective services workers which are

na,²⁵ Ohio,²⁶ South Carolina²⁷ and Utah²⁸ have recognized that state child abuse laws create a special relationship between the State and the subject of an abuse report, thereby imposing on the State a duty to protect the abused child.

In contrast, few courts have held that child protective agencies have no duty toward children identified to them as victims of abuse. In *M.H. ex rel. Callahan v. State*,²⁹ the Iowa Supreme Court acknowledged that the child protection statute might place a duty on the State to protect an abused child but held that the legislature that enacted the statute had not intended to create a private cause of action.³⁰ In *Nelson v. Freeman*,³¹ a federal district court held that Missouri's child abuse statutes do not create a duty toward

clearly for the protection of threatened individuals" and that the state agency therefore had a duty to act with reasonable care upon receiving a report of suspected abuse).

23. *Turner*, 532 A.2d at 668 ("The Child Abuse Prevention Act imposes upon certain public officials specific duties and responsibilities which are intended to protect a narrowly defined and otherwise helpless class of persons: abused and neglected children . . .").

24. *Department of Health & Rehabilitative Servs. v. Yamuni*, 529 So. 2d 258, 261 (Fla. 1988) (holding that the state agency "has a statutory duty of care to prevent further harm to children when reports of child abuse are received").

25. *Coleman v. Cooper*, 366 S.E.2d 2, 7 (N.C. Ct. App. 1988) (observing that "a standard of conduct may be determined by reference to a statute which imposes upon a person a specific duty for the protection of others so that a violation of the statute is negligence *per se*," and reasoning that a breach of the statute establishing standards of conduct for the child protection agency constituted a breach of duty giving rise to an action for negligence) (citing *Lutz Indust. v. Dixie Home Stores*, 88 S.E.2d 333 (N.C. 1955)).

26. *Reed v. Perry County Children's Servs.*, 1993 Ohio App. LEXIS 3408, at *11 (Ohio App. June 29, 1993) (reasoning that "[a] duty is imposed by statute upon appellants [including the Children's Services Board]," and the special relationship thereby created is not abrogated by the governmental immunity statute).

27. *Jensen v. Anderson County Dep't of Social Servs.*, 403 S.E.2d 615, 619 (S.C. 1991) (social workers and child protection agency had a special duty to a child after abuse had been reported).

28. *Owens v. Garfield*, 784 P.2d 1187, 1192 (Utah 1989) ("The Utah child abuse prevention and treatment statute . . . creates a duty on the part of the State and the [agency] to protect children who are identified to them as suspected victims of child abuse.").

29. 385 N.W.2d 533 (Iowa 1986).

30. *Id.* at 537. The court also rejected the possibility that a common law cause of action for malpractice existed in the social services context.

31. 537 F. Supp. 602 (W.D. Mo. 1982), *aff'd sub nom. Nelson ex rel. Wharton v. Missouri Div. of Family Servs.*, 706 F.2d 276 (8th Cir. 1983).

specific individuals.³² Consequently, the *Nelson* court ruled that under the public duty doctrine—a common law rule conferring immunity on government employees who owe a duty to the general public rather than to a specific individual—no private cause of action existed under the relevant statutes.³³

Under the reasoning employed by a majority of courts, however, the public duty doctrine is inapplicable to caseworkers and child protection agencies acting under statutory mandates to investigate and act upon reports of individual cases of suspected child abuse.³⁴ For example, in *Brodie v. Summit County Children Services Board*,³⁵ the Ohio Supreme Court held:

[T]he public duty doctrine does not apply to the children services board in view of the specific and mandatory language of [the Ohio statute] and the fact that the action required by the statute is not directed at or designed to protect the public at large, but intended to protect a specific child who is reported as abused or neglected.³⁶

In fact, the Alaska Supreme Court has expressed general disapproval of the public duty doctrine's grant of immunity as "outmoded, artificial and 'in reality a form of sovereign immunity'" contrary to the desires of the legislature.³⁷ For these reasons, Alaska courts should not find *Nelson* persuasive.

Just as the statutory schemes in many states create a duty owed by the State to reported victims of child abuse, the Alaska child protection statutes impose a duty on the State to protect children identified to DHSS as victims of abuse. An example of this reasoning is found in *Jensen v. Anderson County Department of Social Services*,³⁸ in which the South Carolina Supreme Court listed six elements which give rise to a "special duty" under a statute:

- (1) an essential purpose of the statute is to protect against a particular kind of harm;

32. *Id.* at 610.

33. *Id.* at 612.

34. See Martin, *supra* note 17, at 198.

35. 554 N.E.2d 1301 (Ohio 1990).

36. Similarly, in *Jensen v. Anderson County Department of Social Services*, 403 S.E.2d 615 (S.C. 1991), the Supreme Court of South Carolina held that the child abuse statutes imposed a special duty on the agency, thus bringing the case within an exception to the public duty rule. *Id.* at 617-19.

37. *City of Kotzebue v. McLean*, 702 P.2d 1309, 1312 (Alaska 1985) (quoting *Adams v. State*, 555 P.2d 241 (Alaska 1976)).

38. 403 S.E.2d 615 (S.C. 1991).

- (2) the statute, either directly or indirectly, imposes on a specific public officer a duty to guard against or not cause that harm;
- (3) the class of persons the statute intends to protect is identifiable before the fact;
- (4) the plaintiff is a person within the protected class;
- (5) the public officer knows or has reason to know the likelihood of harm to members of the class if he fails to do his duty; and
- (6) the officer is given sufficient authority to act in the circumstances or he undertakes to act in the exercise of his office.³⁹

The Alaska statutes evidence a legislative intent to protect children from abuse and impose specific duties on the child protective agencies to protect individual abused children.⁴⁰ Because the statutes also identify a specific class of individuals to be protected, children who have been reported as abused, the public duty doctrine is inapplicable. Social workers routinely encounter clear warning signs of abuse, giving them notice of the likelihood of harm. Because social workers are given statutory authority to place children in emergency custody, they have sufficient authority to act.⁴¹ The statutes therefore create a special relationship between the State of Alaska and children who are subjects of child abuse reports.⁴² This relationship imposes upon the State a duty to protect those children.⁴³

3. *The Duty Created by the Common Law in Alaska.* In addition to creating a special relationship, the State, by enacting child protection laws, voluntarily undertook to investigate reports of child

39. *Id.* at 617.

40. *See, e.g.*, ALASKA STAT. § 47.17.010 (1990); *see supra* text accompanying note 10.

41. ALASKA STAT. § 47.10.142 (1990).

42. Even if the *Jensen* factors are not applied, the State of Alaska and its social workers still owe abused children a duty of care: "Duty is not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection." Besharov, *supra* note 2, at 512 (quoting *Smith v. Alameda County Social Serv. Agency*, 153 Cal. Rptr. 712, 715 (Cal. Ct. App. 1979)).

43. This duty applies equally to situations where a caseworker, rather than a third party, reports abuse to the department. Social workers have a statutory duty to report evidence of child abuse, and a social worker who fails to do so is guilty of a class B misdemeanor. ALASKA STAT. §§ 47.17.020(a)(3), .068 (1990). This penalty reaches a situation where a social worker notices (or should have noticed) signs of child abuse but fails to report this to the department. If the social worker reports the suspected abuse but then fails to adequately investigate it, the same analysis regarding the imposition of liability for negligence applies as in cases where the abuse is reported by a third party.

abuse and to protect abused children, thereby creating a common law duty to use due care in its investigation. The Alaska Supreme Court has found such a duty in analogous situations. For example, in *Adams v. State*,⁴⁴ a suit against the State for negligent failure to alleviate fire hazards discovered during a state inspection of a hotel, the court held that "the state assumed a common law duty by its affirmative conduct. . . . [O]nce an inspection has been undertaken the state has a further duty to exercise reasonable care in conducting fire safety inspections."⁴⁵

Similarly, in *Wallace v. State*,⁴⁶ the plaintiff brought a wrongful death action against the State after a worker's death resulted from a safety violation previously discovered by state investigators.⁴⁷ In affirming the principle articulated in *Adams*, the supreme court held that by initiating a safety inspection of the work site, the Department of Labor had "voluntarily assumed a duty to use due care in attempting to remedy the unsafe condition discovered in the course of inspection."⁴⁸ In deciding whether the State has assumed a common law duty, "[t]he basic question is whether the [State] has undertaken a responsibility. If it has, and it has failed adequately to discharge that responsibility, it may be liable to people who have been injured."⁴⁹

Thus, in undertaking to receive and inquire into reports of child abuse, the State has voluntarily assumed a duty to use due care in investigating the reports and protecting abused children. This duty arises under the common law and exists in addition to the State's statutory duty under Title 47.

B. Breach of Duty and Injury

After establishing the existence of a duty of care, courts should determine the remaining elements of negligence—breach of duty

44. 555 P.2d 235 (Alaska 1976).

45. *Id.* at 240. The duty recognized in *Adams* is no longer consistent with the Alaska Code; however, the current applicable statute denies an action for damages only against municipalities. See ALASKA STAT. § 09.65.070(d)(1) (Supp. 1992).

46. 557 P.2d 1120 (Alaska 1976).

47. *Id.* at 1122-23.

48. *Id.* at 1123.

49. *City of Kotzebue v. McLean*, 702 P.2d 1309, 1313 (Alaska 1985). This is the type of liability envisioned by the United States Supreme Court in *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989). See *supra* notes 4-6 and accompanying text.

and an injury proximately caused by that breach—on a case-by-case basis in accordance with traditional tort law principles of negligence. To prove a breach of duty in a caseworker's failure to remove a child from the home of an abusive parent or guardian, the plaintiff must prove by a preponderance of the evidence that a reasonable person in the caseworker's situation would have recognized clear warning signs that the child was in danger of death or serious bodily harm. Liability would typically arise in situations in which child abuse is reported to the appropriate authority and the caseworker fails to investigate, conducts an insufficient investigation, or ignores clear signs that the child should be placed in protective custody.

The facts involved in instances of severe abuse can be chilling. For example, in an Ohio case, *Brodie v. Summit County Children Services Board*,⁵⁰ a guardian ad litem filed suit against the Children Services Board ("CSB") and its employees for negligent failure to investigate reports of child abuse and to pursue dependency and neglect proceedings on the child's behalf.⁵¹ According to the child's affidavit, her father and the woman with whom he lived starved her, shackled her to the bathroom sink for almost a month, imprisoned her in stairwells, rooms, and closets, and burned, hit and beat her, causing wounds which became infected in the absence of medical treatment.⁵² Although evidence of abuse should have been apparent, the caseworker assigned to the case successfully moved to dismiss the dependency and neglect proceeding initiated by CSB.⁵³ A few months later, a school guidance counselor informed CSB that the child had missed school, lost weight, had dark circles under her eyes and a burn on one hand.⁵⁴ Although the counselor, police officers and a doctor met with the child, there was no evidence that CSB renewed contact with her until several months later, after she had been admitted to the hospital in a comatose condition in which she would remain for five months.⁵⁵

50. 554 N.E.2d 1301 (Ohio 1990).

51. *Id.* at 1303.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.* at 1304. The court ultimately remanded the case, holding that caseworkers are entitled to qualified immunity only when performing discretionary functions. See *infra* text accompanying notes 112-113 for a discussion of how Alaska courts determine whether state employees' conduct is discretionary.

A case from Missouri, *Nelson ex rel. Wharton v. Missouri Division of Family Services*,⁵⁶ involved a failure to thoroughly investigate reports of sexual abuse. The child protection agency investigated only two of a number of calls received by its telephone hotline describing a pattern of sexual abuse involving a child, her mother and several men. The investigation consisted merely of brief interviews with the mother and her children.⁵⁷ The investigators failed to interview the children individually or in isolation from their mother, to interview identified witnesses and to request physical examinations of the children.⁵⁸ After this "investigation," the mother prostituted her eight-year-old daughter for forty dollars to a man who performed "various acts of perversion and sexual intercourse" upon the child in front of her siblings.⁵⁹ The child sustained severe physical injuries and died two weeks later; the other children suffered extreme emotional injuries as a result of the incident.⁶⁰

In both *Nelson* and *Brodie*, clear evidence signalled severe abuse. Only in such cases, where there are "definite warning signals, such as evidence of sexual abuse or abandonment, that suggest the need to place a child in protective custody,"⁶¹ should Alaska courts find that a plaintiff has proved breach of duty by a preponderance of the evidence. In many cases, the warning signs of severe abuse will be less clear, and it may be questionable whether an abused child should be removed from his home. In such borderline situations, the traditional negligence standard of reasonableness would not require the caseworker to place the child in protective custody. Imposing liability in such cases would create an unpredictable standard and would likely increase the danger of overintervention by social workers attempting to avoid liability.⁶²

56. 706 F.2d 276 (8th Cir. 1983).

57. *Id.* at 277.

58. *Id.*

59. *Nelson v. Freeman*, 537 F. Supp. 602, 604-05 (W.D. Mo. 1982), *aff'd sub nom. Nelson ex rel. Wharton v. Missouri Div. of Family Servs.*, 706 F.2d 276 (8th Cir. 1983).

60. *Id.* at 605. Applying the public duty doctrine, the court held that the plaintiff had no cause of action because the state child abuse statute created a duty only to the general public. *Id.* at 611. But see *supra* notes 34-37 and accompanying text for reasons why Alaska should reject the public duty doctrine in the child abuse context.

61. Besharov, *supra* note 2, at 517.

62. See *infra* notes 128-130 and accompanying text.

III. IMMUNITY

Although the case law from other states remains divided, Alaska's statutes and case law provide clear guidelines for determining if the State and its employees are immune from liability in negligence actions. Neither social workers nor the state agency are protected by the statutory immunity provisions contained in Title 47.⁶³ Moreover, the Alaska Supreme Court has interpreted the governmental immunity statute⁶⁴ to deny such protection to the State. Individual social workers, however, as state officials, are immune from liability under the common law rule of official immunity. This immunity is qualified rather than absolute; thus, a social worker who acts in bad faith may still be liable for negligence.

A. Statutory Immunity under the Alaska Code

Alaska Statutes section 47.17.050 grants immunity from civil or criminal liability to any person who, in good faith, reports suspected child abuse, permits an interview in the school, or "participates in judicial proceedings related to the submission of reports" under Title 47.⁶⁵ Unlike some other states,⁶⁶ Alaska law does not specifically immunize social workers or people who aid in the investigation of child abuse reports.

Because the immunity provided by Title 47 does not apply to social workers who negligently investigate child abuse reports, even if a social worker reports the abuse, Alaska Statutes section 47.17-.050 only shields the social worker from liability which might

63. See ALASKA STAT. § 47.17.050(a) (1990).

64. See *id.* § 09.50.250 (Supp. 1992).

65. *Id.* § 47.17.050(a) (1990). The statute provides immunity from civil or criminal liability which might otherwise be imposed only with respect to making the report or permitting the interview. The statute explicitly denies immunity to anyone who knowingly makes an untimely report and to those accused of committing the child abuse or neglect. *Id.* § 47.17.050(a)-(b).

66. See Martin, *supra* note 17, at 197, 201. States specifically immunizing social workers include Louisiana, Minnesota and South Dakota. *Id.* at 197. States that immunize anyone who aids in investigating reports of child abuse or fulfilling the statutory mandate include Florida, Arizona and Illinois. *Id.* at 201-02. Although the latter type of statute would seem to immunize social workers, some state courts have held caseworkers liable without even mentioning the existence of such statutes. *Id.* at 202 (citing *Mammo v. State*, 675 P.2d 1347 (Ariz. Ct. App. 1983); *Department of Health & Rehabilitative Servs. v. Yamuni*, 529 So. 2d 258 (Fla. 1988)).

otherwise be imposed for making the report.⁶⁷ The social worker would essentially receive immunity only for participation in judicial proceedings connected to the report of child abuse.⁶⁸ The position that Alaska's social workers are not immune for the negligent investigation of child abuse reports is consistent with that taken by courts in other jurisdictions with similar immunity provisions.⁶⁹

Thus, the immunity provisions contained in Title 47 do not release Alaska state social workers from liability for negligence. Any immunity which might exist must be found under the statutory

67. ALASKA STAT. § 47.17.050 (1990) (“[A] person who, in good faith, makes a report under this chapter . . . is immune from civil or criminal liability that might otherwise be incurred or imposed for making the report . . .”).

68. Other jurisdictions also grant social workers prosecutorial immunity for the initiation of child dependency proceedings. *See, e.g., Meyers v. Contra Costa County Dep't of Social Servs.*, 812 F.2d 1154 (9th Cir. 1987), *cert. denied*, 484 U.S. 829 (1987); *Nation v. Colla*, 841 P.2d 1370 (Ariz. Ct. App. 1991). *Nation* also provides absolute immunity to social workers for actions taken in connection with the pursuit of the child dependency proceeding and qualified immunity for investigative actions preceding the filing of the dependency petition. *Meyers* and *Nation* were federal actions brought under 42 U.S.C. § 1983, however, rather than state tort actions and therefore were decided under different standards.

69. *See, e.g., Brodie v. Summit County Children Servs. Bd.*, 554 N.E.2d 1301 (Ohio 1990). In *Brodie*, the Ohio Supreme Court held that an immunity statute almost identical to the Alaska provision did not apply to social workers who allegedly were negligent in failing to report, initiate and pursue judicial proceedings because the statute “does not confer immunity upon those who fail to carry out the mandate of the statute.” *Id.* at 1309. The Ohio statute reads: “Anyone . . . participating in the making of reports [required] under this section . . . , or anyone participating in a judicial proceeding resulting from the reports, shall be immune from any civil or criminal liability that otherwise might be incurred or imposed as a result” OHIO REV. CODE ANN. § 2151.421(G) (Baldwin 1987) (amended by OHIO REV. CODE ANN. § 2151.421(6) (Baldwin Supp. 1991)).

In *Coleman v. Cooper*, 366 S.E.2d 2 (N.C. Ct. App. 1988), the North Carolina Court of Appeals examined a statute that provided immunity to anyone who reported child abuse or cooperated with the department of social services in any judicial proceeding or statutory program. In holding that the immunity provision did not apply to employees of the department in the performance of their official duties, the court pointed to the intent of the statute, which was “to encourage citizens to report suspected instances of child abuse to the Director of the department without fear of potential liability.” *Id.* at 8.

While other courts have not addressed the immunity statutes directly, courts in states with provisions similar to those of Alaska have found that there is no governmental immunity for the negligent handling of child abuse reports (or that there is no immunity if the social worker's functions are found to be discretionary). *See, e.g., Department of Health & Rehabilitative Servs. v. Yamuni*, 529 So. 2d 258 (Fla. 1988).

provision granting governmental immunity for discretionary functions⁷⁰ or under the common law doctrine of official immunity.

B. Governmental Immunity

1. *Case Law from Other Jurisdictions.* Most courts that have considered the issue of social worker liability for the negligent handling of child abuse cases have relied upon their interpretation of state law regarding governmental immunity.⁷¹ Generally, states provide governmental immunity to the State and/or state employees for the performance of *discretionary* functions, but not for *ministerial* ones. The two main policy rationales for granting immunity for discretionary functions are (1) to preserve the separation of powers by preventing courts from imposing tort liability for discretionary decisions made by other branches of the government⁷² and (2) to prevent private citizens from hindering the effective functioning of government by challenging governmental policy decisions in court.⁷³

Courts outside Alaska are divided on the question of whether an investigation of a child abuse report constitutes discretionary conduct protected by governmental immunity. Michigan and Illinois courts, for example, have found individual social workers and the State to be protected by governmental immunity. The Michigan Court of Appeals held that the activities of the State and state agencies in dealing with reported child abuse are "clearly a governmental function to which immunity applies."⁷⁴ Likewise, in *Midamerica Trust Co. v. Moffatt*,⁷⁵ the Illinois Court of Appeals held that under the Illinois public duty doctrine protecting state employees from liability for discretionary acts, a social worker's

70. ALASKA STAT. § 09.50.250 (Supp. 1992).

71. See, e.g., *Yamuni*, 529 So. 2d 258; *Midamerica Trust Co. v. Moffatt*, 511 N.E.2d 964 (Ill. Ct. App. 1987); *Williams v. State*, 376 N.W.2d 117 (Mich. Ct. App. 1985); *Coleman v. Cooper*, 403 S.E.2d 577 (N.C. Ct. App. 1991); *Brodie*, 554 N.E.2d at 1301; *Bradford v. Davis*, 626 P.2d 1376 (Or. 1981); *Jensen v. Anderson County Dep't of Social Servs.*, 403 S.E.2d 615 (S.C. 1991); *National Bank of South Dakota v. Leir*, 325 N.W.2d 845 (S.D. 1982).

72. *Japan Air Lines v. State*, 628 P.2d 934, 936 (Alaska 1981).

73. *Id.*; *Ebarb v. Stanislaus County*, 246 Cal. Rptr. 845, 850 (Cal. Ct. App. 1988).

74. *Williams*, 376 N.W.2d at 118. The court failed to offer specific reasons for its confidence that the activities were protected by governmental immunity.

75. 511 N.E.2d 964 (Ill. Ct. App. 1987).

decisions in placing a foster child are discretionary and therefore immune from liability, absent corrupt or malicious motives.⁷⁶

The South Carolina Court of Appeals has taken a compromise position. In *Jensen v. South Carolina Department of Social Services*,⁷⁷ the court noted that in most cases involving a report of child abuse, the scope of the investigation and the decision to close the file are discretionary matters protected by official immunity.⁷⁸ However, because the caseworker and the child protection agency in *Jensen* failed to conduct any investigation at all—despite a statutory duty to do so—the court found that the defendants had breached a mandatory, ministerial duty and therefore were not immune from liability.⁷⁹

Other courts have declined to extend immunity to the State and/or individual social workers for negligence in child abuse or foster placement cases. An Arizona court imposed liability on the State for failure to act upon a report of child abuse without addressing the issue of governmental immunity.⁸⁰ In *Department of Health & Rehabilitative Services v. Yamuni*,⁸¹ the Florida Supreme Court held that caseworkers' conduct in investigating and responding to reports of child abuse constitutes an operational, rather than discretionary, activity because the activity does not occur at the policymaking level.⁸² Thus, the agency was not immune from liability.⁸³ The South Dakota Supreme Court reached a similar conclusion in *National Bank of South Dakota v. Leir*,⁸⁴ holding that sovereign immunity did not bar a suit against social workers for negligent foster placement.⁸⁵ The court found the responsibilities

76. *Id.* at 966-69.

77. 377 S.E.2d 102 (S.C. Ct. App. 1988), *aff'd (in part) sub nom.* *Jensen v. Anderson County Dep't of Social Servs.*, 403 S.E.2d 615 (S.C. 1991).

78. *Id.* at 107.

79. *Id.* at 107-08. On appeal, the South Carolina Supreme Court remanded the case to determine whether a thorough investigation was made and whether the decision to close the file was discretionary. *Jensen*, 403 S.E.2d at 620.

80. *Mammo v. State*, 675 P.2d 1347 (Ariz. Ct. App. 1983). Similarly, in *Turner v. District of Columbia*, 532 A.2d 662 (D.C. 1987), the court, without mentioning the issue of governmental immunity, held that the District of Columbia and its employees could be held liable for negligence in failing to remove children from the care of an abusive father.

81. 529 So. 2d 258 (Fla. 1988).

82. *Id.* at 260.

83. *Id.*

84. 325 N.W.2d 845 (S.D. 1982).

85. *Id.* at 850.

of social workers to be ministerial functions governed by established guidelines for the placement and supervision of foster children.⁸⁶ In *Coleman v. Cooper*,⁸⁷ a suit charging negligent handling of a child abuse investigation, the North Carolina Court of Appeals reversed a trial court's entry of summary judgment in favor of a social worker. The court of appeals found that the defendant was a "mere employee" who was not entitled to the immunity reserved for higher level public officials.⁸⁸

A few courts have left the immunity issue undecided. In *Brodie v. Summit County Children Services Board*,⁸⁹ for example, the Ohio Supreme Court remanded the case for a determination of whether the child protection agency and its employees performed discretionary or ministerial acts.⁹⁰ Similarly, in *Bradford v. Davis*,⁹¹ the Oregon Supreme Court remanded a suit for negligent foster placement. The court sought a determination of whether the defendant "had been delegated responsibility for a policy judgment and exercised such responsibility," i.e., whether the defendant had been engaged in a discretionary function protected by immunity.⁹²

Thus, case law from other jurisdictions provides no clear guidance on the immunity issue; the rulings vary from state to state. Whether the State of Alaska and its social workers are immunized from tort liability must be resolved by turning to the Alaska statutes and case law regarding the immunity of the State and state employees in analogous situations.

86. *Id.*

87. 366 S.E.2d 2 (N.C. Ct. App. 1988).

88. *Id.* at 8; *see also* Hare v. Butler, 394 S.E.2d 231 (N.C. Ct. App. 1990) (social workers were employees of the county agency, rather than public officers, and thus could be held personally liable for negligence in the performance of their duties); Olson v. Ramsey County, 497 N.W.2d 629 (Minn. Ct. App. 1993) (social worker's investigation in child abuse case was not protected by discretionary immunity doctrine; thus, neither the social worker nor the county were immune from liability). *But see* S.L.D. v. Kranz, 498 N.W.2d 47 (Minn. Ct. App. 1993) (social workers' decision that a call did not constitute a report of neglect was a discretionary act; thus both the social workers and the county were immune from liability for negligence).

89. 554 N.E.2d 1301 (Ohio 1990).

90. *Id.* at 1307. In a more recent case, however, the Ohio Court of Appeals refused to grant immunity to a child protection agency for negligence in the investigation of a report of child abuse. *Reed v. Perry County Children's Servs.*, 1993 Ohio App. LEXIS 3408 (Ohio App. June 29, 1993).

91. 626 P.2d 1376 (Or. 1981).

92. *Id.* at 1382.

2. *Immunity of the State under Alaska law.* As do other states that have considered the question of liability for the negligent handling of child abuse reports, Alaska has a statutory provision regarding governmental immunity. Pursuant to Alaska Statutes section 09.50.250, a person may bring a tort claim against the State so long as the claim is not "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a state agency or an employee of the State, whether or not the discretion involved is abused."⁹³ The Alaska Supreme Court has interpreted this statute on a number of occasions.

In *State v. Abbott*,⁹⁴ the supreme court adopted a planning-operational test to determine whether a function is discretionary or ministerial.⁹⁵ Under this analysis, basic policy decisions occur at the planning level and constitute discretionary functions immune from attack under Alaska Statutes section 09.50.250. The performance and implementation of those policy decisions, however, occur at the operational level and are not protected by governmental immunity.⁹⁶ In *Abbott*, the plaintiff sought recovery for the negligent maintenance of a state highway during the winter. The court held that while the initial decision to maintain the highways during the winter was made at the planning level, the implementation of that policy decision occurred at the operational level: "[o]nce the basic decision to maintain the highway in a safe condition throughout the winter is reached, the State should not be given discretion to do so negligently."⁹⁷

93. ALASKA STAT. § 09.50.250 (Supp. 1992). The statute also precludes a tort action when based on the act or omission of a state employee "exercising due care, in the execution of a statute or regulation, whether or not the statute or regulation is valid." *Id.* This provision would not bar a negligence action, however, as a state employee who acted negligently would by definition not have exercised due care.

94. 498 P.2d 712 (Alaska 1972).

95. *Id.* at 721-22.

96. *Id.* The court observed that this test is consistent with the policy of preserving the separation of powers, as it prevents the courts from passing judgment on basic policy decisions made by other branches of the government. *Id.* at 721.

97. *Id.* at 722. Other Alaska cases have applied the planning-operational test adopted in *Abbott*. For example, in *State v. I'Anson*, 529 P.2d 188, 193-94 (Alaska 1974), the court held that the State's failure to place a warning sign and no-passing striping on a highway near the entrance road to a campground did not involve the type of "broad basic policy decision" that would be considered a discretionary function under the planning-operational test. In *State v. Stanley*, 506 P.2d 1284 (Alaska 1973), a crab vessel owner brought suit against the State because the vessel

In *Adams v. State*,⁹⁸ the court extended the planning-operational test adopted in *Abbott* to a case in which the State was not in direct control of the instrumentality that caused harm. *Adams* involved the State's failure to take action with regard to fire safety hazards discovered during an inspection of a hotel which subsequently burned to the ground.⁹⁹ The court held that the State owed a duty of care to those injured as a result of the negligent inspection.¹⁰⁰ While the State's decision to inspect was a discretionary decision made at the planning level, the negligent inspection constituted an operational or ministerial act for which the State was liable under Alaska Statutes section 09.50.250.¹⁰¹

Under the rationale of the Alaska Supreme Court decisions applying the planning-operational test, the State is not immune from liability for the negligent handling of child abuse cases by its employees. Individual social workers do not formulate basic policy decisions on whether to handle reports of child abuse. They are merely implementing those policies expressed in Title 47 and in agency guidelines. With the enactment of Title 47, the State made a policy decision to investigate reports of child abuse. Once the

sank while in the possession of the State's representatives. Applying the planning-operational test, the court found that the failure to exercise proper care in securing the vessel occurred at the operational level and was not protected by discretionary function immunity. *Id.* at 1291.

98. 555 P.2d 235 (Alaska 1976).

99. *Id.* at 243.

100. *Id.* at 240. However, in *State v. Jennings*, 555 P.2d 248 (Alaska 1976), a similar case decided the same day as *Adams*, the court made clear that the State was not absolutely liable for allowing any violation of the fire safety code to continue unabated. *Id.* at 250. In *Jennings*, the City of Fairbanks had inspected a hotel that eventually was destroyed by fire. The court held that the State assumed no duty where the State had not conducted its own inspection and did not have a principal-agent relationship with the city that conducted the fire inspections and enforced the fire code. *Id.*

101. *Adams*, 555 P.2d at 241, 243-44. The court reached similar results in three other cases involving the application of the planning-operational test. See *Japan Air Lines v. State*, 628 P.2d 934, 938 (Alaska 1981) (decision to build airport runway suitable for use by wide-body jets held to be a planning/policy decision, but design decisions were operational decisions not immune from liability); *Carlson v. State*, 598 P.2d 969, 973 (Alaska 1979) (decision to maintain highway turnout in winter was planning/policy decision, but failure to remove garbage from turnout was operational decision subject to liability when a bear attracted to the site injured woman); *Wallace v. State*, 557 P.2d 1120, 1124 (Alaska 1976) (decision to inspect work site was planning/policy decision, but negligent performance of the inspection was operational/ministerial function not immune from liability).

decision to investigate is made, the performance of the investigation constitutes a ministerial, operational act. Consequently, the State owes a duty of care to children injured as a result of a negligent investigation and may be liable in tort for such negligence under Alaska Statutes section 09.50.250.¹⁰²

3. *Immunity of Individual Social Workers under Alaska Law.* The standard used to determine governmental immunity is different for a state employee than for the State itself. When considering the immunity of a state employee, Alaska courts do not apply the planning-operational test described above but instead rely on a common law rule. Both tests grant immunity for the performance of a discretionary function, but the term "discretionary function" is defined differently under the common law rule. Under this rule, a discretionary act is one that requires ""personal deliberation, decision, and judgment.""¹⁰³

The Alaska Supreme Court has applied the common law rule in various contexts to determine a state employee's personal liability. The standard was first established in *Bridges v. Alaska Housing Authority*,¹⁰⁴ a suit against the Housing Authority and

102. Although the Alaska Supreme Court has not yet ruled on this specific issue, an Alaska Superior Court recently denied the State's claim that Alaska Statutes section 09.50.250 confers governmental immunity for the negligent failure to adequately investigate child abuse reports or to conduct regular visits to the home. Order Regarding Cross-Motions for Summary Judgment, *Estate of Todd Burnette v. State*, No. 3AN-91-3595 CI (Superior Court of Alaska, Third Judicial District, Oct. 29, 1993), at 13.

Other states that use the planning-operational test to determine whether a function is discretionary have also held that the State is not immune from liability in the child abuse context. See, e.g., *Department of Health & Rehabilitative Servs. v. Yamuni*, 529 So. 2d 258 (Fla. 1988).

103. *Aspen Exploration Corp. v. Sheffield*, 739 P.2d 150, 155 (Alaska 1987) (quoting *State v. Haley*, 687 P.2d 305, 316 (Alaska 1984) (quoting WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 132, at 988-89 (4th ed. 1971))). In *Aspen Exploration*, the court defined a discretionary function using the *Haley* court's language, even though *Haley* involved a tort claim under the United States Constitution.

The court did not explain why Alaska applies a different standard in the context of individual liability than it does for sovereign immunity. The standards may be different simply because the court prefers to apply the common law standard until directed otherwise (as it was in the context of sovereign immunity by Alaska Statutes section 09.50.250). The policy reasons discussed *infra* in part IV, however, support the maintenance of distinct standards.

104. 375 P.2d 696 (Alaska 1962).

two of its employees for an illegal taking. The court held that the employees were public officers because they were employed by an agency that existed to serve a public need.¹⁰⁵ As public officers, the employees were immune "under the well recognized rule that affords such protection to a public officer, acting within the scope of his official duties, for damages caused by a mistake by him in the exercise of judgment or discretion, or because of an erroneous interpretation of the law."¹⁰⁶ Later, in *State v. Stanley*,¹⁰⁷ the supreme court concluded that a state employee's failure to secure an impounded crab vessel was not a discretionary act and therefore was not protected by common law immunity.¹⁰⁸ In *Earth Movers of Fairbanks, Inc. v. State*,¹⁰⁹ however, the court held that a state trooper who reduced the speed limit in a highway construction area was immune from personal liability. His decision constituted a discretionary act because it was a good faith determination of his authority to maintain safe road conditions.¹¹⁰

The court further explained the rule regarding a public official's immunity in *Aspen Exploration Corp. v. Sheffield*,¹¹¹ when a rejected applicant for an offshore prospecting permit sued the governor of Alaska. The court reasoned that in order to qualify for official immunity, the conduct involved must be within the scope of the official's authority and must be discretionary in nature.¹¹² Using the now-standard language, the court defined a discretionary act as an act requiring "personal deliberation, decision and judgment," while a ministerial act amounts "only to obedience

105. *Id.* at 702.

106. *Id.*

107. 506 P.2d 1284 (Alaska 1973).

108. *Id.* at 1292 (labeling discretionary acts as "discretionary judgment-policy decisions").

109. 691 P.2d 281 (Alaska 1984).

110. *Id.* at 283-84. The court held that the State was immune from liability as well. *Id.* at 284. While the analysis in this case is somewhat confusing, the Alaska Supreme Court has since explained that a close reading of *Earth Movers* "shows that we applied statutory (sovereign) immunity [i.e., Alaska Statutes section 09.50.250] to the claims against the State, and common law (official) immunity to the claims against the individual officer." *Aspen Exploration Corp. v. Sheffield*, 739 P.2d 150, 153 (Alaska 1987) (citing *Earth Movers*, 691 P.2d at 285 (Rabinowitz, J., concurring)).

111. 739 P.2d 150 (Alaska 1987).

112. *Id.* at 155. The court distinguished between an abuse of authority and complete lack of authority. Where a state employee merely abuses his authority, he may qualify for official immunity. *Id.* at 155 n.11.

of orders, or the performance of a duty in which the officer is left with no choice of his own.”¹¹³

Under this common law rule, individual social workers in Alaska are immune from personal liability for the negligent handling of child abuse cases. As in *Bridges v. Alaska Housing Authority*,¹¹⁴ social workers are public officers; they are employed by an agency that exists to serve a public need. Decisions involving the removal of a child from his home clearly lie within the scope of the duty and authority of social workers. Furthermore, such decisions require personal deliberation and judgment. Although provided with guidelines,¹¹⁵ social workers are not merely performing a duty in which they are given no latitude for action. Thus, although the State owes a duty of care under Alaska Statutes section 09.50.250, under the standards for official immunity established by Alaska case law, social workers are immune from personal liability for negligence in investigating child abuse reports.

4. *Absolute versus Qualified Immunity.* Official immunity, once granted, may be either qualified or absolute. Most states have adopted a rule of qualified immunity for public officials, which protects an official from liability only where discretionary acts within the scope of authority are performed “in good faith and are not malicious or corrupt.”¹¹⁶ However, in *Aspen Exploration Corp. v. Sheffield*,¹¹⁷ the Alaska Supreme Court refused to adopt “an all or nothing approach” to immunity.¹¹⁸ The court held that whether an official received absolute or qualified immunity would depend on the particular circumstances and conduct involved in each case, with special consideration given to these factors:

113. *Id.* at 155 (quoting *State v. Haley*, 687 P.2d 305, 316 (Alaska 1984) (quoting WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 132, at 988-89 (4th ed. 1971))).

114. 375 P.2d 696 (Alaska 1962).

115. DIVISION OF FAMILY AND YOUTH SERVICES, DEPARTMENT OF HEALTH AND SOCIAL SERVICES (DHSS), CHILD PROTECTIVE SERVICES MANUAL (1989) (a policy and procedure manual providing social workers with detailed guidelines for conducting child abuse investigations).

116. *Aspen Exploration*, 739 P.2d at 158 (citing *Trimble v. City & County of Denver*, 697 P.2d 716, 729 (Colo. 1985); *Shellburne, Inc. v. Roberts*, 238 A.2d 331, 338 (Del. 1968)).

117. 739 P.2d 150 (Alaska 1987).

118. *Id.* at 159.

(1) The nature and importance of the function that the officer performed to the administration of government (i.e. the importance to the public that this function be performed; that it be performed correctly; that it be performed according to the best judgment of the officer unimpaired by extraneous matters);

(2) The likelihood that the officer will be subjected to frequent accusations of wrongful motives and how easily the officer can defend against these allegations; and

(3) The availability to the injured party of other remedies or other forms of relief.¹¹⁹

In evaluating these considerations, a court should determine whether qualified or absolute immunity applies to a given situation as a matter of law.¹²⁰ If qualified immunity applies, an inquiry into the public employee's good faith becomes relevant.¹²¹

An evaluation of the factors set forth in *Aspen Exploration* suggests that a social worker's liability for negligent handling of child abuse reports must be qualified rather than absolute. The proper performance of social workers' functions is crucial to serving the public interest in protecting children from abuse. Imposing liability on social workers who act with corrupt or malicious motives will not impair the judgment of other social workers as long as they know that they are indeed protected from liability when acting in good faith. Moreover, qualified immunity will deter social workers from acting in bad faith. Although some social workers may be faced with false allegations of bad faith, they should find it relatively easy to defend themselves against unsubstantiated claims as the plaintiff bears the burden of proving corrupt or malicious motives. These factors, particularly the importance of the social workers' functions, outweigh the fact that there exists another available form of relief (i.e., a suit against the State) and indicate that social workers should be protected by qualified rather than absolute immunity.¹²²

119. *Id.* at 159-60. The court limited application of the test to situations in which a public employee violates a plaintiff's common law rights. The court explicitly reserved opinion as to situations in which a public official allegedly violates statutory or constitutional rights. *Id.* at 160 n.23.

120. *Id.* at 160.

121. *Id.*

122. This conclusion is in accord with that of Professor Douglas Besharov, a leading scholar in the area of child abuse law. Besharov argues that good faith immunity is necessary for a variety of policy reasons, the most important of which is preventing overintervention by the social worker. *See Besharov, supra* note 2,

IV. POLICY ISSUES

There are a number of valid policy arguments both supporting and opposing the imposition of liability for the negligent investigation of child abuse reports. A rule that places liability on the State, but not on the individual social worker, resolves most of the policy difficulties created by the imposition of liability for negligent investigations. Moreover, such a rule would serve the complementary purposes of compensating victims and deterring negligence.

A. Arguments for Granting Immunity

1. *Effective Government.* One of the most common arguments for granting governmental immunity is that the imposition of tort liability would inhibit effective governmental decisionmaking.¹²³ Courts in Alaska, however, have rejected this argument. In *State v. Abbott*,¹²⁴ the Alaska Supreme Court opined that the negligence standard "is an extremely flexible standard, and consequently will not inhibit the vigorous and effective performance by the State of its duties in the way that a more rigid standard might."¹²⁵ In *Wallace v. State*,¹²⁶ the court rejected the argument that the imposition of liability might deter the State from inspecting work sites, reasoning that the State had a mandatory duty to inspect such locations upon request and to enforce occupational safety and health standards.¹²⁷ Thus, Alaska courts have not found the possible

at 549; Besharov, *supra* note 3, at 554-62. Besharov recognizes, however, that the facts of the cases he analyzes demonstrate that sometimes civil or even criminal liability is necessary, where the official's misconduct stems from actual malice or a reckless disregard of legal requirements. Besharov, *supra* note 2, at 549, 552.

The conclusion is also consistent with the decision of the Ohio Supreme Court in *Brodie v. Summit County Children Services Board*, 554 N.E.2d 1301 (Ohio 1990), which granted qualified rather than absolute immunity to social workers. *Id.* at 1307.

123. See, e.g., *Department of Health & Rehabilitative Servs. v. Yamuni*, 529 So. 2d 258, 265-66 (Fla. 1988) (Overton, J., dissenting); *Williams v. State*, 376 N.W.2d 117, 119 (Mich. Ct. App. 1985) (citing *Elliott v. Department of Social Servs.*, 333 N.W.2d 603 (Mich. Ct. App. 1983)); Timothy J. Courville, Note, *Government Liability for Failure to Prevent Child Abuse: A Rationale for Absolute Immunity*, 27 B.C. L. REV. 949, 980 (1986).

124. 498 P.2d 712 (Alaska 1972); see *supra* notes 94-97 and accompanying text.

125. *Id.* at 725.

126. 557 P.2d 1120 (Alaska 1976).

127. *Id.* at 1124-25.

prevention of effective functioning of government to be a persuasive reason to grant immunity to the State.

Specifically, imposing liability on the State will not impair the effective functioning of child abuse agencies, particularly because Title 47 places a compulsory statutory duty on the State to investigate reports of child abuse. Child protection agencies will not and cannot stop investigating reports of abuse. If anything, the imposition of liability will enhance the functioning of those agencies by deterring negligence.

2. *Overintervention.* The imposition of personal liability on individual social workers would clearly have a negative effect. The most compelling argument for granting individual immunity is that if liability is imposed, social workers will attempt to avoid personal liability by placing children in protective custody in cases where such action may not be necessary.¹²⁸ Such overintervention would harm many children unnecessarily, interfere with parental rights and directly conflict with Alaska's policy of keeping families together whenever possible. This policy is manifested in Title 47, which explicitly declares as one of the statute's purposes:

[To] preserve and strengthen the child's family ties unless efforts to [do so] are likely to result in physical or emotional damage to the child, [and to] remov[e] the child from the custody of the parents only as a last resort when the child's welfare or safety or the protection of the public cannot be adequately safeguarded without removal.¹²⁹

The threat of overintervention is a strong argument for granting qualified immunity to individual social workers, as the threat of

128. For an extensive discussion of the problem of overintervention, see Besharov, *supra* note 3, at 554-62; Besharov, *supra* note 2, at 547-48; Courville, *supra* note 123, at 980.

129. ALASKA STAT. § 47.05.060 (1990). This policy is repeated in Alaska Statutes §§ 47.17.010, which provides that the intent of the legislature is to "preserve family life unless that effort is likely to result in physical or emotional damage to the child," and 47.17.030, which states: "Before the department or a local government health or social services agency may seek the termination of parental rights . . . it shall offer protective social services and pursue all other reasonable means of protecting the child." *Id.* §§ 47.17.010, .030(d).

A number of Alaska cases under Title 47 have also recognized this policy. See, e.g., *D.H. v. State*, 723 P.2d 1274, 1277 (Alaska 1986); *In re J.R.B.*, 715 P.2d 1170, 1173 (Alaska 1986); *State v. R.H.*, 683 P.2d 269, 278 (Alaska Ct. App. 1984); *E.A. v. State*, 623 P.2d 1210, 1213 n.5 (Alaska 1981); *Rita T. v. State*, 623 P.2d 344, 346 (Alaska 1981).

personal liability would likely lead to the placement of children in protective custody where such action is unnecessary. Imposing liability on the State rather than on individual social workers will not have the same effect, however, because the individuals making the decisions will not bear the risks of personal liability. Further mitigating the danger of overintervention is the fact that the State and its employees are faced with the possibility of a lawsuit by the parents if they remove a child from the home unnecessarily, thereby violating parental rights.¹³⁰ This threat should counterbalance any incentive for the State to act hastily in removing children from their homes.

3. *Cost.* Another legitimate concern with the imposition of liability on the State is that such liability would unduly strain public funds.¹³¹ While this is undoubtedly true, the Alaska Supreme Court has observed in a number of cases that the State, in waiving immunity from tort liability in most cases, has adopted a policy of spreading the risk of negligence over all taxpayers rather than imposing it on the individual victim.¹³² Furthermore, in *In re E.A.O.*,¹³³ the court rejected the argument that imposing the medical costs of children in its care on DHSS would deter the department from taking legal custody, noting that “[w]hether the department is adequately funded to carry out its statutory responsibilities, or whether those responsibilities should be changed in

130. Marcia C. Sprague, *Defining the Risks After DeShaney*, 11 CHILDREN'S LEGAL RTS. J. 8, 12-14 (1990); see also *Coverdell v. Department of Social & Health Servs.*, 834 F.2d 758 (9th Cir. 1987).

The United States Supreme Court also mentioned this possibility in *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989), stating in defense of the social workers that “had they moved too soon to take custody of the son away from the father, they would likely have been met with charges of improperly intruding into the parent-child relationship.” *Id.* at 203.

Social workers should be immune from personal liability in this type of situation also, because under the common law doctrine of official immunity, they are performing a discretionary function by placing a child in protective custody.

131. See, e.g., *Courville*, *supra* note 123, at 980; *Besharov*, *supra* note 2, at 546-47. Besharov points out that the State must pay extensive legal fees to defend even unfounded suits, and that there is an additional cost to the system in the suspension or transfer of child welfare workers. *Id.*

132. See, e.g., *Adams v. State*, 555 P.2d 235, 244 (Alaska 1976); *State v. Abbott*, 498 P.2d 712, 724 (Alaska 1972).

133. 816 P.2d 1352 (Alaska 1991).

response to budgetary realities, is a question for the legislature to answer."¹³⁴

Thus, it seems that Alaska courts would not be receptive to an argument for immunity based on the rationale that imposing liability would be too costly for the State. Instead, the risk of negligence by social workers should be spread across all taxpayers rather than imposed on individual victims of the State's negligence. The possibility that the imposition of liability would leave child protective services with insufficient funds to carry out their duties would be a problem for the Alaska legislature to address.

4. *Disincentive Effect.* A final argument against the imposition of liability for the negligent handling of child abuse reports is that it would create a disincentive for persons wishing to enter the field of social work. One commentator advances a similar point by arguing that imposing liability on social workers would often result in unfair blame.¹³⁵ In many cases, the fault lies not with the individual social worker, but with decisions made at a higher level or with the chronic problems of understaffing and insufficient funding.¹³⁶ This danger may be avoided, however, by imposing liability solely on the State and not on individual social workers.

B. Arguments for Imposing Liability for Negligence

1. *Deterrent Effect.* Imposing liability for the negligent handling of child abuse reports will, to some degree, deter negligence. It is not necessary to impose liability on individual social workers, however; deterrence can be accomplished by imposing liability only on the State. The state agency will thus be given an incentive to ensure — through training, supervision and enforcement of its guidelines — that its caseworkers thoroughly investigate

134. *Id.* at 1358. This argument is similar to that advanced in *Turner v. District of Columbia*, 532 A.2d 662 (D.C. 1987), which held that the concern for the depletion of public resources was eliminated by a specific provision in the D.C. Child Abuse Prevention Act that required the agency to have sufficient staff and resources to accomplish the purposes of the act. *Id.* at 673.

135. Besharov, *supra* note 2, at 545-46.

136. *Id.* Besharov also argues that in many cases it is unfair to blame caseworkers because of the difficulty inherent in detecting and predicting child abuse. *Id.* at 545. In such cases, where it is not clear that the child should have been removed from the home, courts should not impose liability on either the State or the individual social worker.

reports of abuse and remain alert to signs that a child should be placed in protective custody. If threatened with liability, the State may also become "more creative and energetic about finding new solutions to the problem."¹³⁷

Preventing negligence in the handling of child abuse cases will best be achieved by imposing liability only where there are definite warning signs of severe abuse. Such a solution is more reasonable for social workers, as it provides them with guidance, lessening their uncertainty about when their actions may prompt a negligence suit. Providing social workers with a consistent legal standard will both enhance the deterrent effect of imposing liability and reduce the risk of overintervention discussed above.

2. *Compensation.* Imposing liability for negligence will also provide compensation to the victims of that negligence. Such compensation would be in accord with Alaska's policy of risk-spreading, in that "society, rather than the injured individual, should bear the cost of the state's negligence."¹³⁸ The goal of compensating victims is best achieved by imposing liability on the State, not on the individual social worker. Only the State can spread the risk over all taxpayers, and in most cases, only the State can afford to pay the judgment. Commentators have suggested a number of ways the State could finance these costs, including the purchase of liability insurance, the creation of statutory limits on claims against the State and the passage of floating bond issues.¹³⁹

V. CONCLUSION

Both the State and its social workers have a duty to protect children identified to them as victims of abuse. This duty arises under Title 47 of the Alaska Code, which creates a special relationship between the State and the abused children, as well as under the common law. The issues of breach of duty and injury to the victim should be determined on a case-by-case basis. Liability for negligence should be imposed only when a plaintiff proves by a

137. Martin, *supra* note 17, at 218. One commentator argues that imposing liability on individual social workers would "frustrate this goal [of deterring negligence] because more often than not, the source of the problem is found in organizational conditions." *Id.*

138. Adams v. State, 555 P.2d 235, 244 (Alaska 1976); see also State v. Abbott, 498 P.2d 712, 724 (Alaska 1972).

139. See, e.g., Martin, *supra* note 17, at 217.

preponderance of the evidence that there were definite warning signals, such as evidence of sexual abuse or abandonment, that a child should have been placed in protective custody.

Individual social workers have qualified immunity under common law official immunity principles established by Alaska case law. Under the Alaska governmental immunity statute, however, the State is not immune from liability for the negligent handling of child abuse reports by its employees because the employees are not performing discretionary functions as defined by the planning-operational test. Thus, the State can be held liable for negligence under Alaska law, but a social worker acting in good faith cannot.¹⁴⁰

Imposing liability on the State but not on individual social workers either removes or mitigates most of the policy concerns regarding the imposition of liability. This solution is less likely to interfere with the effective functioning of government or lead to overintervention by social workers. It also removes the problem of placing unfair blame on social workers and eliminates a disincentive for individuals considering entering the profession. At the same time, imposing liability on the State furthers the important goals of deterring negligence and compensating victims of that negligence. Thus, policy considerations as well as Alaska state law dictate that liability for negligence in the handling of child abuse investigations be imposed only upon the State.

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140. This conclusion is consistent with the position taken by many commentators. See, e.g., Besharov, *supra* note 2, at 549; see generally Martin, *supra* note 17. But see Courville, *supra* note 123, at 985, 987 (arguing that both the State and the individual caseworkers should be absolutely immune in the context of a 42 U.S.C. § 1983 claim).

Some argue that the best way to immunize social workers is to enact a statute specifically granting them immunity. Besharov, *supra* note 2, at 551-2; Martin, *supra* note 17, at 211-12, 219.